IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-283

FREDERICK E. ADAMS,

Petitioner,

—v.—

ROBERT WILLIAMS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION OF THE AMERICAN CIVIL LIBERTIES UNION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*; BRIEF *AMICUS CURIAE*

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Motion of the American Civil Liberties Union for Leave to File Brief *Amicus Curiae*

The American Civil Liberties Union respectfully moves, pursuant to Rule 42 of this Court's Rules, for leave to file the attached brief *amicus curiae*. Counsel for the petitioner has consented to the filing of the brief; counsel for the respondent has withheld such consent. Both letters have been filed with the Clerk of the Court.

The American Civil Liberties Union is a nationwide, non-partisan organization of over 170,000 members solely dedicated to defending the liberties guaranteed by the Bill of Rights. One of the most vital of those civil liberties is the right of privacy premised on the Fourth Amendment and reinforced by other Amendments as well. As a result of our concern with this central constitutional safeguard, which nourishes so many of our society's other values, we have participated in many of this Court's cases which have defined the scope of Fourth Amendment protection. Most relevantly, we filed briefs *amicus curiae* in *Terry* v. *Ohio*,

392 U.S. 1 (1968) and *Sibron* v. *New York*, 392 U.S. 40 (1968), the two cases which bear directly on the issues herein.

The purpose of this brief is to suggest to the Court the larger doctrinal context in which the specific issue must be decided. It is our understanding that *amicus* briefs have been filed urging greater police powers to initiate street confrontations with our citizens. We think it vital that this Court reaffirm the strict limits which must circumscribe such authority. We believe that this brief will assist the Court in reconciling these interests.

Respectfully submitted,

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BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, *AMICUS CURIAE*

Interest of *Amicus*

The interest of the American Civil Liberties Union is set forth in the preceding motion for leave to file this brief.

Introduction and Summary of Argument

The issue in this case arises out of a police-citizen street confrontation of the kind analyzed by this Court in *Terry* v. *Ohio,* 392 U.S. 1 (1968) and *Sibron* v. *New York,* 392 U.S. 40 (1968). In those cases, *amicus* urged that all such confrontations must be governed by the strict requirements of the Fourth Amendment. We still adhere to that analysis. But this Court disagreed, and accordingly this brief is premised on the understanding that *Terry* and *Sibron* provide the relevant rules of decision bearing on the issues here.

Conversely, it is equally important to note that the issues here in no way involve this Court's unbroken line of authority which holds that police officers may not effect an arrest without meeting the rigorous Fourth Amendment requirements of probable cause. No matter what type of criminal activity is involved, an *arrest* can only be made on probable cause. As this Court reaffirmed just a few weeks ago,

> We allow our police to make arrests only on "probable cause", a Fourth and Fourteenth Amendment standard applicable to the States as well as to the Federal Government. *Papachristou* v. *City of Jacksonville*, —— U.S. ——, 40 U.S. Law Week 4216, 4220 (1972) (footnotes omitted).

A.

However, with regard to police-citizen confrontations on less than probable cause, relevant distinctions as to the kind of criminal activity to be prevented can be made. In short, such encounters can be justified only if limited to investigations of serious crimes involving a reasonably immediate threat to persons or property. *Terry* v. *Ohio, supra.* This distinction—between investigations of serious criminal activities and enforcement of legislation against "victimless crimes"—is implicit in many of this Court's decisions. It is not coincidental that many of the major Fourth Amendment decisions of this Court have come in the context of prosecutions for violations of morals legislation. *Compare, e.g., Mapp* v. *Ohio,* 367 U.S. 642 (1961) (possession of obscenity) and *Spinelli* v. *United States,* 393 U.S. 410 (1969) (gambling), *with Terry* v. *Ohio, supra* (armed robbery). Thus, any further relaxation of the

Fourth Amendment to encompass morals offenses poses unique dangers to privacy. *Brinegar* v. *United States*, 338 U.S. 160, 180-89 (1949) (dissenting opinion). Accordingly where, as here, the suspected criminal activity involves a crime such as possession of narcotics, the relaxed standards of *Terry* v. *Ohio* should be inapplicable.

B.

Assuming *arguendo* that the rationale of *Terry* is extended from "serious" crimes to those offenses designed to shield persons from themselves, nevertheless, the officer here did not possess sufficiently trustworthy information to justify the confrontation. Neither the fact that the petitioner was seated in an automobile in a high crime area late at night, nor the information provided by an alleged tipster satisfied the *Terry* standard of "articulable suspicion." If there is to be a lowering of the quantum of information necessary to justify a police-citizen encounter, it is particularly important that police officers be required to insure that their action is based on something substantial. Moreover, the flimsy quality of the tip is made even more suspect by the police refusal to supply the tipster so that meaningful judicial review could be accomplished. *McCray* v. *Illinois*, 386 U.S. 300 (1967); *People* v. *Verrecchio*, 23 N.Y.2d 489 (1969). And again, in the context of this case, the combination of inadequate information and inadequate procedure are particularly subversive of Fourth Amendment values.

C.

Finally, even if defensive frisks by officers investigating serious crimes are to be allowed on less than probable cause, it does not necessarily follow that the fruits of such frisks should be admissible in a criminal prosecution. Certainly, since the sole purpose of the *Terry* exception to the probable cause requirement is the protection of the officer, where contraband other than deadly weapons is discovered, it should be inadmissible. If a frisk for lethal weapons can become an exploratory search for narcotics, then the *Terry* exception will inexorably invite wholesale general searches. See *Chimel* v. *California*, 395 U.S. 752, 763 (1969). Similarly, even as to the discovery of lethal weapons, since the only purpose for allowing a search on less than probable cause—the protection of the officer—has been secured, there is no further justification for utilizing the information obtained by a departure from Fourth Amendment standards. *Boyd* v. *United States*, 116 U.S. 616 (1886); cf. *Garrity* v. *New Jersey*, 385 U.S. 493 (1967). Such a rule would further a critical purpose of the exclusionary rule—"the imperative of judicial integrity." *Elkins* v. *United States*, 364 U.S. 222 (1960).

Police-citizen confrontations on less than probable cause must be confined to field investigations of serious crimes involving a reasonably immediate threat to persons or property.

In *Terry* v. *Ohio*, 392 U.S. 1 (1968), this Court empowered police officers to initiate police-citizen confrontations upon "articulable suspicion" less than probable cause that serious criminal activity was afoot, and to conduct a limited "defensive" frisk of persons so confronted when the police officer involved reasonably believes such persons to be armed and dangerous. As Mr. Justice Harlan's concurrence in *Terry* noted, the threshold analytical issue in such cases is the nature of the suspected criminal activity which would justify a police officer in initiating a police-citizen encounter on less than probable cause. 392 U.S. at 33. The corrosive impact upon the Fourth Amendment of permitting serious intrusions upon personal liberty on less than probable cause requires that a *Terry* "frisk" be confined to investigations of *serious* criminal activity posing a reasonably immediate threat to persons or property. In the absence of such a reasonably immediate threat, no relaxation of traditional probable cause safeguards is constitutionally tolerable.

In *Terry*, the police officer was confronted with information which raised an "articulable suspicion" that a serious crime (burglary) was imminent. Accordingly, this Court recognized his right to initiate a forcible police-citizen encounter and to conduct a defensive frisk. However, in *Sibron* v. *New York*, 392 U.S. 40 (1968), where the suspected criminal activity was possession of narcotics, a crime not

posing an immediate threat to person or property, this Court refused to sanction a *Terry*-type frisk on less than probable cause.

Thus, when "serious" crimes, such as murder, rape and robbery are reasonably suspected,[1] *Terry* sanctions a forcible investigative encounter between a policeman and a suspect coupled with a narrow defensive frisk on mere "articulable suspicion." However, when "morals" offenses, such as gambling, prostitution or possession of narcotics are suspected, *Sibron* forbids a forcible investigative encounter, with its attendant defensive frisk, on less than probable cause.

It is, we submit, no coincidence that those cases which have shaped the growth of the Fourth Amendment in the 20th century have overwhelmingly involved police attempts to enforce "victimless crimes" by the most effective means open to them—systematic intrusions into the sphere of personal privacy protected by the Fourth Amendment.

Thus, *Weeks* v. *United States*, 232 U.S. 383 (1914) involved an arrest for violating anti-gambling laws; *Wolf* v. *Colorado*, 338 U.S. 25 (1949) involved conspiracy of a practicing physician to commit abortion; *Mapp* v. *Ohio*, 367 U.S. 643 (1961) involved possession of obscenity; *Beck* v. *Ohio*, 379 U.S. 89 (1964) involved possession of gambling slips; *Aguilar* v. *Texas*, 378 U.S. 108 (1964) involved possession of narcotics; *Sibron* v. *New York*, 392 U.S. 40 (1968), involved possession of narcotics; and *Spinelli* v. *United States*, 393 U.S. 410 (1969), involved violation of gambling laws. On the other hand, cases involving "serious" as opposed to "victimless" criminal activity have received

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[1] The substantive standards which govern reasonable suspicion are discussed in Point II, *infra*.

a far different reception in this Court. *Draper* v. *United States,* 358 U.S. 307 (1959) involved the sale of heroin; *Warden* v. *Hayden,* 387 U.S. 294 (1967) involved armed robbery; *McCray* v. *Illinois,* 386 U.S. 300 (1967) involved the sale of heroin; *Terry* v. *Ohio,* 392 U.S. 1 (1968) involved armed robbery; and *Peters* v. *New York,* 392 U.S. 40 (1968) involved burglary.

As Mr. Justice White noted in his concurrence in *Spinelli* v. *United States, supra,* at 423-29, "tension" exists between cases such as *Aguilar* and *Spinelli* and cases such as *Draper.* Amicus respectfully suggests that the source of that "tension" may be found in Mr. Justice Jackson's dissent in *Brinegar* v. *United States,* 338 U.S. 160, 180-89 (1949), where he recognized the special dangers which morals legislation pose to the Fourth Amendment. This Court has recognized in case after case, that any relaxation of the protection of the Fourth Amendment in the area of victimless crimes, exposes the "right to be let alone" [2] to relentless pressure from law enforcement agencies seeking to enforce morals legislation. Given the fact that under the best of circumstances, the detection of "victimless crimes" involves significant intrusions into the sphere of privacy protected by the Fourth Amendment, the relaxation of probable cause announced in *Terry* in the context of serious crimes should not be extended to police investigations of alleged violations of criminal laws designed primarily to protect persons from themselves.

Since, in the instant case, the suspected criminal activity which triggered Officer Connolly's encounter with Williams involved possession of narcotics, the relaxed standards of

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[2] *Olmstead* v. *United States,* 277 U.S. 438, 478 (1928) (dissenting opinion).

Terry should be inapplicable and the propriety of Officer Connolly's search must be tested against traditional Fourth Amendment requirements of probable cause. Under such traditional standards, the searches involved herein were clearly unlawful. *Beck* v. *Ohio, supra.*

II.

No sufficient basis existed to initiate a police-citizen confrontation under *Terry* v. *Ohio.*

Even if the rationale of *Terry* v. *Ohio, supra,* is extended from "serious" crimes to those offenses designed to shield persons from themselves, the information available to the police officer here did not satisfy the standard of "articulable suspicion" of criminal activity required to initiate a police-citizen confrontation. Neither the substantive quality of the information available to Officer Connolly nor the procedural posture in which it was presented to the reviewing court, justified police insistence upon a forcible encounter.

A. *The Substantive Quality of the Information Available to the Police Officer*

Officer Connolly relied upon two elements in determining to initiate the police-citizen encounter which culminated in this appeal.

First, he relied upon his personal observation of Williams sitting alone in a parked car at 2:15 A.M. in a "high-crime" area. As Chief Judge Friendly pointed out below, such an observation alone could not even remotely have justified an encounter between Officer Connolly and Williams. See, e.g., *Henry* v. *United States,* 361 U.S. 98 (1959). As this

Court has repeatedly emphasized, a policeman's subjective "hunches," even though formed in good faith, may not found the basis of a police-citizen confrontation. E.g., *Beck* v. *Ohio, supra; Terry* v. *Ohio, supra.*

Second, the officer relied upon the alleged[3] existence of an unnamed tipster who is said to have informed Officer Connolly that Williams was armed with a pistol and had narcotics in his possession. Even if one accepts the existence of the informer, the quality of his "tip" was insufficient to create the "articulable suspicion" of criminal activity required by *Terry.* At no time did the tipster inform Officer Connolly of the source of his "knowledge" that Williams was engaged in criminal activity; nor was any attempt made by Officer Connolly to explore the basis of the tipster's information to insure that it was not based upon mere rumor or hunch. E.g., *Spinelli* v. *United States, supra.*

While "hearsay" information may support the basis for a police-citizen encounter, the quality of such "hearsay" information must be subject to scrutiny to insure that rumor or hunch did not trigger an informant's actions. As Mr. Justice Harlan observed in *Spinelli,* an informant's tip must rest upon something more substantial than "a casual rumor circulating in the underworld" or "an offhand remark heard at a neighborhood bar." 393 U.S. at 416-17. Thus, in the instant case, where the unnamed tipster's

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[3] Chief Judge Friendly observed below:

> "It is cause for no small wonder that on the first suppression hearing, Officer Connolly never mentioned the informer but said he had responded to a police signal. In the subsequent hearing the informer appeared and the signal disappeared." 436 F.2d at 36, n. 4.

information may have been the result of casual rumor or subjective hunch, Officer Connolly was not justified in initiating a forcible encounter without exploring its foundation at greater length. Just as Officer Connolly's own subjective hunch could not have justified his forcible encounter with Williams, the unverified subjective hunch of an unnamed informant cannot found the basis for the substantial interference with the person permitted under *Terry*. It would be a strange rule of law indeed which forbade a police officer from acting on his own subjective "hunch," but encouraged him to act on the unverified subjective hunches of anonymous tipsters. At the very least, therefore, Officer Connolly was under a threshold substantive obligation to explore the source of his tipster's information before acting upon it.[4]

Such a threshold obligation is all the more important in view of the relaxation in *Terry* of the quantum of substantive information needed to justify a "stop and frisk." Given the lowering in *Terry* of the quantum of information needed to justify a police-citizen encounter, police officers must be placed under a strict duty to insure that the information upon which they ultimately initiate a forcible encounter with a citizen is founded upon something more substantial than an anonymous tipster's "hunch." Cf. *Aguilar* v. *Texas, supra*. Such a duty would safeguard the critical Fourth Amendment values of privacy which are the hallmark of a free society, while permitting expeditious

[4] Such an exploration need not unduly interfere with expeditious police action. In this case, Officer Connolly might have satisfied the requirement by merely asking his informant, "How do you know?" In other situations, where it is obvious that a tipster's information is based upon something more substantial than mere rumor or hunch, additional investigation might be unnecessary.

and effective investigation of tips based upon credible foundations.

B. *The Procedural Posture of the Information Available to the Police Officer*

This Court has repeatedly emphasized the importance of insuring meaningful judicial review of the circumstances surrounding police-citizen encounters in order to assure that the protections of the Fourth Amendment are not relegated solely to the good faith of the police. E.g., *Beck* v. *Ohio, supra; Aguilar* v. *Texas, supra; Spinelli* v. *United States, supra.* As this Court stated in *Terry*:

> "The scheme of the Fourth Amendment becomes meaningful only when it is assured that at some point the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular search or seizure in light of the particular circumstances. And in making that assessment it is imperative that the facts be judged against an objective standard. . . . Anything less would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches, a result this Court has consistently refused to sanction." 392 U.S. at 21-22 (footnotes omitted).

However, the procedural posture in which the information which allegedly justified Officer Connolly's investigative frisk of Williams was presented to the reviewing court made the "detached, neutral scrutiny of a judge" all but impossible.

Most importantly, the identity of Officer Connolly's alleged tipster was never revealed. Nor was any explanation

offered at the suppression hearing as to why resort to an anonymous hearsay tipster was necessary to advance any compelling state interest. Cf. *Roviaro* v. *United States*, 353 U.S. 53 (1957).

Although in *McCray* v. *Illinois*, 386 U.S. 300 (1967), a 5-4 majority of this Court sustained the use of an anonymous informant to establish probable cause for an arrest, the circumstances surrounding the *McCray* tip were, nevertheless, subject to meaningful judicial review. In *McCray*, the informant had been successfully utilized by the police officer in question on twenty separate occasions and had personally observed the defendant selling narcotics at a specific location. The substantive specificity of the informant's allegations, coupled with the readily verifiable use of the informant on numerous previous occasions, permitted a reviewing court to exercise a meaningful review of the reasonableness of the police encounter at issue in *McCray*. However, with the relaxation of the requirement of substantive content in *Terry*, the internal specificity of an informant's allegations can no longer be counted upon to provide a reviewing court with a "handle" to review the propriety of police action under the Fourth Amendment. In the absence of the objective criteria of internal consistency and corroboration which ordinarily permit a reviewing court to exercise meaningful judicial review in probable cause situations, a magistrate, faced with the dilemma of affording meaningful judicial review in "articulable suspicion" cases under *Terry*, must be assured at a minimum, that the alleged tipster actually exists. The inevitable result of sanctioning the use of anonymous tipsters in "articulable suspicion" cases would be to place the values of the Fourth Amendment wholly at the mercy of police officers. A reviewing magistrate,

deprived of any opportunity to verify the existence of anything more than an "inarticulate hunch," would be reduced to a rubber stamp, and the Fourth Amendment would be reduced to a mere admonition—to be ignored at will.

As Chief Judge Friendly noted below, in framing a general rule to control the mis-use of unnamed informers in "articulable suspicion" cases, the danger of *post-hoc* police fabrication of a non-verifiable tipster cannot be ignored. The highly delayed and suspicious emergence of the unnamed tipster in the instant case bears mute witness to the capacity for abuse inherent in a rule sanctioning anonymous hearsay which does not even satisfy the substantive content criteria of *McCray*. See, generally, Skolnick, *Justice Without Trial*, 227-28 (1966).

Just as this Court ruled in *Spinelli* v. *United States, supra,* that police may not initiate a forcible encounter upon the unverified tip of an unnamed informer, so a magistrate seeking to perform his duties conscientiously under *Terry* should not be compelled to accept the existence of an unnamed, unverifiable tipster whose story, by definition, lacks the sufficient detail present in both *Draper* v. *United States, supra* and *McCray* v. *Illinois, supra*.

Where, as here, an alleged informant a) is anonymous; b) is not objectively credible; c) does not divulge the basis for his "knowledge"; d) recites vague and general information not subject to internal corroboration; and e) does not demonstrate any basis for remaining unnamed, a magistrate is wholly prevented from conducting the "neutral," "detached" review of police conduct which is at the heart of the Fourth Amendment. Accordingly, police encounters based upon such alleged informer tips can-

not be condoned without, in the words of Chief Judge Friendly:

> "open[ing] the sluice gates for serious and unintended erosion of the protection of the Fourth Amendment." 436 F.2d at 39.

In *People* v. *Verrecchio*, 23 N.Y.2d 489, 245 N.E.2d 222 (1969), the New York Court of Appeals directed that the identity of an alleged informer be revealed when his vague and unverified accusation was the sole basis of a police-citizen encounter. The Court recognized that without some form of independent corroboration of the alleged informer's existence, a reviewing magistrate is rendered powerless to perform his duty.

Thus, in "articulable suspicion" cases, a police officer must be under a minimal threshold procedural obligation to ascertain the identity of his alleged informant, and to make his identity known to the reviewing magistrate—or else present some acceptable, alternative evidence of his existence.[5]

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[5] The Police Department of the City of New York has promulgated a form (UF 250) which must be completed by patrolmen acting in "articulable suspicion" cases under *Terry*. The form, a copy of which is reproduced as an appendix to this brief, requires the disclosure of an informant's identity. No justification exists for tolerating the initiation of police-citizen encounters without complying with the minimal procedural formalities spelled out by Form UF 250.

III.

The fruits of police-citizen confrontations on less than probable cause should not be admissible in criminal prosecutions.

The defensive frisk authorized by *Terry* as a protective device for police officers engaged in field investigation of serious crime was a significant dilution of the protection of the Fourth Amendment. Nevertheless, the demonstrated risk which a policeman faces during the investigation of a suspected "serious" crime appeared to compel the narrow, limited relaxation of probable cause enunciated in *Terry*. However, it does not follow that merely because this Court has recognized the "necessity" of such a defensive frisk, its fruits may indiscriminately found the basis for criminal prosecution. The question remains of the extent, if any, to which 1) non-lethal contraband and 2) dangerous weapons discovered pursuant to a *Terry* frisk may be utilized by the State in a subsequent criminal prosecution.

A. *Contraband Other Than Deadly Weapons Discovered Pursuant to a* Terry *Frisk*

The sole purpose of the limited exception to the probable cause protection of the Fourth Amendment sanctioned in *Terry* was the self-protection of the investigating officer. When the fruits of a *Terry* frisk, however, do not consist of material capable of having inflicted serious injury upon the investigating officer, no justification exists for permitting its use in a criminal prosecution. A *Terry* frisk is a species of limited purpose intrusion described by Mr. Justice Stewart in his concurrence in *Stanley* v. *Georgia*, 394 U.S. 557, 569 (1969), which may not be permitted to

ripen into a more general search without severely eroding the protection of the Fourth Amendment. Cf. *Sibron* v. *New York*, *supra*; *Marron* v. *United States*, 275 U.S. 192 (1927). Unless material incapable of inflicting serious injury is excluded from the fruits of a *Terry* frisk, the pressures to utilize the exception in *Terry* as a device to justify more general searches for contraband on less than probable cause will be inexorable. If non-lethal contraband is removed from the potential fruits of a *Terry* frisk, this Court will invite wholesale refinements of the *Sibron* fact pattern without the possibility of meaningful judicial review. The essentially subjective element of fear which ostensibly differentiated *Sibron* from *Terry* is, of course, extremely difficult to subject to meaningful judicial review. In effect, therefore, if police may hope to discover non-lethal contraband pursuant to a *Terry* frisk, we may anticipate a significant—and unreviewable—decline in the threshold of fear exhibited by metropolitan police seeking to enforce laws against gambling, prostitution and narcotics possession. The result would be the *de facto* enunciation of a subjective standard which this Court explicitly rejected in *Terry*. 392 U.S. at 21-22.

It may be argued that, since the purpose of the exclusionary rule is the deterrence of unlawful police-citizen confrontations and since the police-citizen confrontation epitomized in *Terry* is lawful, no basis exists for imposing an exclusionary rule upon the fruits of such a confrontation. However, this Court in *Terry* was careful to limit its sanctioning of frisks on less than probable cause solely to "protective . . . search[es] for weapons." *Id.* at 29, and expressly emphasized that "[t]he scope of [a *Terry*] search must be strictly tied to and justified by the circumstances which rendered its initiation permissible." *Id.* at 19. See also, *Chimel* v. *California*, 395 U.S. 752, 763 (1969). By

sanctioning the use of a *Terry* frisk to uncover non-lethal contraband, this Court would be virtually insuring that *Terry* will be neither confined to "protective" situations, nor strictly tied to the circumstances which rendered its initiation permissible. Thus, the imposition of an exclusionary rule upon non-lethal contraband seized as the fruits of a *Terry* frisk would be wholly in accordance with the rationale underlying *Mapp* v. *Ohio*, 367 U.S. 643 (1961), since it is the only practical device to insure meaningful judicial protection of the sphere of privacy which is the core of the Fourth Amendment.[6]

B. *Deadly Weapons Discovered Pursuant to a* Terry *Frisk*

Concern for the safety of police officers engaged in the investigation of serious crimes motivated this Court in *Terry* to recognize a narrow "defensive" exception to the probable cause rule. In effect, *Terry* recognized that the societal interest in protecting the lives of police officers outweighed the countervailing values protected by the Fourth Amendment in certain limited circumstances.[7] Having recognized that an overriding societal interest in ac-

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[6] It may be argued that the non-lethal contraband which formed the basis of Williams' narcotics conviction was not the fruit of a *Terry* frisk, since it was seized pursuant to a search incident to Williams' arrest for possession of a weapon uncovered by a *Terry* frisk.

However, despite the erection of a technical justification for the search of Williams culminating in the discovery of non-lethal contraband, it is conceded that probable cause never existed to initiate a confrontation with Williams. Thus, absent the *Terry* frisk, no basis for conducting a search of Williams existed. Accordingly, to deny that the narcotics involved herein are the fruits of a *Terry* frisk confounds reality.

[7] Amicus believes that if such a dilution of the Fourth Amendment is to occur, it should be pursuant to constitutional amendment, rather than judicial construction. *Terry* v. *Ohio*, 329 U.S. 1, 39 (1968) (Douglas, J. dissenting).

quiring certain information (whether a suspect is armed with a deadly weapon) compels a dilution of the Fourth Amendment's guaranty of personal inviolability, this Court must decide the permissible uses to which society may put the information which it has obtained pursuant to procedures which concededly fall below the norms prescribed by the Fourth Amendment. Amicus believes that use of the coerced information should be confined to the overriding purpose which justified its acquisition—the safeguarding of a police officer's life. Once that purpose has been achieved, no further use of the information should be permitted.

In the closely connected area of the Fifth Amendment, when our society has found it necessary to coerce individuals to divulge information pursuant to procedures which fall below the norms prescribed in the Fifth Amendment, we have refrained from utilizing the information as the basis of a criminal prosecution against the individuals concerned. Thus, public officials may, upon pain of dismissal, be compelled to divulge information for which society alleges an overriding need. However, information so divulged may not be utilized as the basis of subsequent criminal prosecutions against them. See, e.g., *Garrity* v. *New Jersey*, 385 U.S. 493 (1967). Society, thus, satisfies its limited need for certain information without sacrificing or unduly weakening the constitutional protections which safeguard us all. Similarly, in the Fourth Amendment area, when society finds it necessary to compel the disclosure of information pursuant to procedures which do not satisfy the Fourth Amendment, it must not be permitted to utilize such "tainted" information, except to

[8] *Boyd* v. *United States*, 116 U.S. 616, 633 (1886).

satisfy the need which initially justified the compulsory disclosure. In the context of a *Terry* frisk, the societal need which authorized a search on less than probable cause is satisfied by the protection afforded to the investigating officer. Once that protection has been afforded, no further inroads upon the Fourth Amendment should be tolerated.

Of course, the imposition of an exclusionary rule upon deadly weapons seized as the basis of a *Terry* frisk would not be designed primarily to deter police misconduct, since the very purpose of the *Terry* rule is to permit police officers to unearth deadly weapons capable of inflicting harm upon them. It would, however, advance the second, critical purpose served by the exclusionary rule—"the imperative of judicial integrity." *Elkins* v. *United States,* 364 U.S. 206, 222 (1960); *Mapp* v. *Ohio, supra.* To the extent we permit our courts to receive and to act upon information gathered under procedures which are corrosive of constitutional guarantees, we sanction disrespect for and evasion of our most basic laws. As Mr. Justice Clark noted in *Mapp*:

> Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence. 367 U.S. at 659; cf. *Shelley* v. *Kraemer,* 334 U.S. 1 (1948).

Thus, if this Court deems it necessary to continue to permit *Terry* searches on less than probable cause, the proper conduct of such a search may continue to be recognized as a defense to an action under Title 42 U.S.C. §1983 without doing unnecessary violence to the underlying protection which the Fourth Amendment provides against governmental intrusions upon the inviolability of the person in the absence of probable cause.

CONCLUSION

Criminal cases posing Fourth Amendment issues are merely the visible tip of an iceberg of police-citizen confrontations. While the immediate issue before the Court in this appeal is the liberty of one alleged criminal, the effect of the Court's Fourth Amendment decisions are felt with astonishing immediacy by the residents of urban America. Indeed, the tone of life in large segments of metropolitan America is significantly affected by the extent to which this Court places effective limits upon the initiation of forcible police-citizen encounters. To millions of law-abiding Americans, the very real distinction between living in a police-state and living in a free society depends in large part upon the extent to which this Court evolves meaningful Fourth Amendment controls upon police behavior. The narrow exception recognized in *Terry*, out of concern for the safety of our police, must not be permitted to evolve into a convenient device for by-passing the Fourth Amendment.

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March 1972